Phelps Dodge Magnet Wire Corporation *and* International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) and its Local 1807. Cases 26–CA–18913–1 and 26–CA–19133–1

April 19, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The General Counsel of the National Labor Relations Board issued a consolidated complaint and notice of hearing dated January 17, 2002, upon charges filed by the International Union, United Automobile and Aerospace Workers of America (UAW) and its Local Union 1807 (the Union), alleging that Respondent Phelps Dodge Magnet Wire Corporation violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to bargain with the Union prior to laying off union officials pursuant to a super seniority provision contained in the parties' governing employment terms. The complaint specifically alleges that the Respondent unlawfully laid off union bargaining committee members Donna Parker and Etherd Blake and Steward Jason C. Sumner without bargaining with the Union. The Respondent filed an answer denying the commission of unfair labor practices.

On August 22, 2002, the parties entered into a stipulation of facts, and on August 27, 2002, the parties submitted a motion to transfer proceedings to the Board. The parties waived a hearing before an administrative law judge and agreed to submit the case directly to the Board for findings of fact, conclusions of law, and a Decision and Order, based on a record consisting of the charges, the consolidated complaint, the answer to the complaint, the Order postponing the hearing, the stipulation of facts, and the accompanying exhibits. On September 12, 2003, the Board approved the stipulation and transferred the proceeding to the Board. Thereafter, the General Counsel, the Union, and the Respondent filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record stipulated to by the parties and the parties' briefs, and makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a division of Phelps Dodge Industries, Inc., a Delaware corporation. At all material times, the Respondent maintained a facility in Hopkinsville, Kentucky, where it manufactures wire products. During the calendar year ending December 31, 1999, the Respondent, in conducting its business operations, purchased and received at its Hopkinsville, Kentucky facility goods valued in excess of $50,000 directly from points located outside the State of Kentucky, and sold and shipped from its Hopkinsville facility goods valued in excess of $50,000 directly to points located outside the State of Kentucky. It is stipulated and we find that the Respondent is an employer engaged in commerce within the meaning of Section 2 (2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2 (5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Union has represented a unit of production and maintenance employees at the Hopkinsville plant for many years, and the parties have negotiated a series of collective-bargaining agreements. Effective July 1, 1997—following a good faith impasse in bargaining for a successor contract to the parties' 1993–1997 bargaining agreement—the Respondent lawfully implemented unilaterally its final proposal. The implemented employment terms included, among other things, a change with respect to the application of super seniority for union officials.

Under the former super seniority provision, all members of the Union's bargaining committee (who were directly involved in grievance handling and contract administration) possessed super seniority for purposes of layoff and recall, as did three stewards per shift. Under the newly implemented employment terms, "up to five" bargaining committee members and only one steward per shift possessed super seniority.

The applicable provision is article 16.5. It states:

> Up to five members of the Bargaining Committee, and one Steward per shift, shall have top seniority in their respective areas for layoff and recall purposes only, and shall be retained or recalled provided they are qualified to perform an available job. Respective areas as used in this paragraph means the area that a Bargaining Committee member or a steward is elected to represent.

Article 16.5 is part of the "Reduction and Recall" section of the employment terms contained in section 16. Section 16

sets forth terms concerning the application of seniority, bumping, recall from layoff and temporary layoffs, among other things.

In November 1998, the Respondent notified the Union that it intended to curtail operations at the Hopkinsville plant and that there would be a permanent shutdown of some of the plant's production equipment. Between November 10 and 12, 1998, the Respondent laid off 92 unit employees. Among the laid-off employees were Donna Parker, the Union's recording secretary/bargaining committee member; Etherd Blake, the Union's financial secretary/bargaining committee member; and Jason Sumner, a third shift steward. All were qualified to perform jobs made available to retained senior employees. Prior to implementing the layoff, the Respondent did not notify the Union that Parker, Blake, and Sumner were being laid off or provide the Union with the names of employees affected by the layoff. The Respondent did not discuss with the Union any aspect of the application of article 16.5 in connection with these layoffs.

Five union bargaining committee members were retained after the layoffs. These five had sufficient regular seniority to avoid being affected by the layoff without having to use "top seniority" as provided above in article 16.5. Chief Steward Kenneth Bates was among those retained. He formerly worked on the second shift, but displaced a junior employee on the third shift. Swing Shift Steward Albert Gold was also retained. Gold displaced a junior employee on the third shift, but did not serve as the third shift steward.

On November 13, 1998, the Union objected to the Respondent's selection of union officers for layoff. The Respondent replied that it complied fully with article 16.5 because, under its terms, five union committee members were retained, as required under that provision.

On March 1, 1999, the parties entered into a new collective-bargaining agreement. The new agreement states that all of the "members of the [Union's] bargaining committee, and one steward per shift" shall have top seniority for layoff and recall and shall be retained or recalled if qualified to perform an available job. On March 8, 1999, Parker and Blake were recalled. The Respondent offered Sumner reinstatement on November 19, 1999, but he declined the offer.

B. The Arbitration

On November 17, 1998 and January 25, 1999, the Union filed grievances concerning the layoffs of the union officers and the failure to recall Blake. The Union did not seek arbitration of the Respondent's denial of these grievances. On February 26, 1999, the Union filed a grievance alleging that the Respondent breached article 16.5 of the employment terms by selecting Parker, Blake, and Sumner for layoff. Thereafter, arbitrator Frank Keenan sustained the Union's grievance. The arbitrator found that the Respondent erred when it construed article 16.5 as simply a declaration that, after a layoff situation, the Union was guaranteed up to five bargaining committee members still working in the work force. He found that article 16.5 meant that if a layoff succeeded in reaching up to five members of the bargaining committee, each could use super seniority to avoid layoff. Here, the layoff reached only two bargaining committee members and, therefore, both were entitled to exercise super seniority. As to Steward Sumner, the arbitrator found that he was entitled to "hold" his shift and that the Respondent was not entitled to replace Sumner with a steward from another shift. In sustaining the grievance, the arbitrator found that the layoffs were implemented in good faith and in accordance with the Respondent's perception of what the employment terms required. He found that the case "is essentially about the rectitude of that perception."

In fashioning a remedy, the arbitrator awarded backpay to Blake and Parker only from February 26, 1999—the date the grievance was filed—to March 1, 1999, the date of recall. As to Sumner, the arbitrator awarded backpay from February 26, 1999, to March 6, 2000, the date the arbitrator found was the due date for his award. The award was rendered on September 15, 2000. The arbitrator found that had the grievance been filed earlier in relation to the underlying events, the Respondent would have been on notice of its alleged violation and would have had an opportunity to mitigate its potential liability.

C. Contentions of the Parties

The General Counsel contends that this case does not involve a dispute over contract language. According to the General Counsel, article 16.5 does not identify which bargaining committee members will receive super seniority and the Respondent had a duty to bargain over the provision's application. The General Counsel also contends that the arbitrator's award is palpably wrong and repugnant to the Act because the arbitrator's remedy tolled backpay based on arbitrary considerations.

The Union contends that the Respondent unilaterally changed the employment terms applicable to seniority and super seniority. Additionally, the Union contends that the Respondent unlawfully failed to furnish information when it did not provide the Union with a list of laid-off employees before the layoffs occurred.

The Respondent contends that the dispute at issue turns on the interpretation of the layoff provisions set forth in section 16 of the employment terms. It contends that it had a sound arguable basis to interpret the provi-

sion as it did and that the General Counsel's theory depends on a contrary plausible interpretation. The Respondent contends that there is not a statutory bargaining violation in such circumstances. It also contends that, because there is no unfair labor practice, there is no reason to address the arbitrator's remedy.

D. Discussion

As noted, the General Counsel contends that this case does not involve a dispute over contract language. Thus, the General Counsel argues that there has never been any bargaining between the parties as to how the five officers entitled to super seniority were to be chosen and, therefore, the Respondent was obligated to bargain over the application of super seniority prior to the layoffs.

It is true that the employment terms were unilaterally implemented by the Respondent, after a lawful impasse in bargaining was reached, and were not consented to by the Union. Thus, the employment terms do not constitute a collective-bargaining agreement. Nevertheless, no party to this proceeding disputes that the employment terms lawfully were in effect, and served as the governing terms and conditions of employment for the unit employees, at the time of the Respondent's actions in this case. Indeed, the Union filed a grievance, and invoked arbitration, based on those terms. Thus, for purposes of this proceeding, we believe that it is appropriate to treat the employment terms as if they were a contract and to regard the dispute here as essentially one of contract interpretation.

This matter was arbitrated under the grievance-arbitration procedure set forth in the employment terms[1] and no party contested the arbitrability of the instant dispute. Indeed, this matter was deferred to contract arbitration by the Board's Regional Office under *Dubo Mfg. Corp*., 142 NLRB 431 (1963), and the arbitrator found that the union officers at issue were contractually entitled to super seniority under the provisions of the governing employment terms.

The General Counsel contends that the present case is similar to *Fritz Cos.*, 330 NLRB 1296 (2000), but that case is distinguishable. There the Board found that an employer violated Section 8(a)(5) and (1) when it failed to bargain prior to implementing layoffs, rejecting the employer's claim that it was privileged to undertake the layoffs pursuant to a previous letter of understanding. But, as the Board found, the letter of understanding in *Fritz* did not address layoff procedures or the application of seniority to layoffs. 330 NLRB at 1297. Accordingly, the parties were obligated to bargain anew over matters not previously bargained. Here, in contrast, section 16 of the employment terms addresses layoff procedures and the application of seniority and article 16.5 addresses the application of super seniority. Section 17, in turn, sets forth a grievance-arbitration procedure for resolving disputes regarding section 16. The Respondent and the Union followed those provisions.

The Union contends that the Respondent unilaterally modified the employment terms. But, as stated, it is appropriate to treat the employment terms as if they were a contract and to regard the dispute here as essentially one of contract interpretation. In such cases, the 8(a)(5) allegation turns on whether the employer has a sound arguable basis for its interpretation of the contract. See, e.g., *Crest Litho*, 308 NLRB 108, 110 (1992); *Vickers, Inc*., 153 NLRB 561, 570 (1965). "Where . . . the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the Union, we will not seek to determine which of two equally plausible contract interpretations is correct." *Atwood & Morrill Co*., 289 NLRB 794, 795 (1988).

Here, the Respondent interpreted article 16.5 to mean that up to five union bargaining committee members and one steward per shift shall be retained in the event of a layoff. The initial clause of article 16.5 refers to "up to five" committee members and one steward per shift, and the final clause of the same sentence states that those members and stewards "shall be retained or recalled." The Respondent interpreted article 16.5 as literally requiring retention of that number of members and stewards. Because a sufficient number of officers was retained based on the officers' regular seniority, the Respondent determined that article 16.5 was satisfied, that is, up to five committee members and one steward per shift were still at work following the layoffs.

The arbitrator rejected that interpretation. He found that the Respondent's interpretation gave inadequate weight to the clause in article 16.5 that links the five members and one steward per shift to "top seniority in their respective areas." The arbitrator found that "up to five" meant that up to five (plus one steward per shift) are entitled to super seniority—not simply the right to retention under normal seniority. Although he found that the Respondent's interpretation was incorrect, the arbitrator specifically found that the Respondent did not act in bad faith.

[1] Sec. 16 of the governing employment terms sets forth a detailed mechanism for layoffs, reductions in force, and recalls from layoff. Art. 16.5 expressly governs the application of super seniority. Further, the governing employment terms set forth a procedure for resolving disputes regarding sec. 16. Under sec. 17, the parties are subject to a grievance procedure "with respect to the interpretation or application of the provisions of these employment terms in connection with an alleged violation of these employment terms," culminating in arbitration.

We find that, although the Respondent's construction of article 16.5 may have been erroneous, its interpretation had a sound arguable basis. As the arbitrator noted, the Respondent acted in good faith, based on its interpretation of the employment terms. Further, as the arbitrator found, the Respondent "simply erred" when it construed article 16.5 as a declaration that the Union was guaranteed the retention of up to five bargaining committee members (and stewards) after a layoff, rather than as a statement that up to five committee members could exercise top seniority. In our view, article 16.5 is not a model of clarity and either interpretation was plausible, even if the latter interpretation ultimately prevailed in arbitration.

In these circumstances, we find that the General Counsel has failed to prove that the Respondent modified the employment terms within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1). Finally, because the Respondent's interpretation does not rise to the level of a statutory violation, it is unnecessary to consider the propriety of the arbitrator's remedy. That remedy pertains only to a breach of contract and not to the commission of unfair labor practices.[2]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. April 19, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[2] The complaint does not allege that the Respondent failed to furnish information in violation of Sec. 8(a)(5). Accordingly, we find it unnecessary to address the Union's contention that the Respondent violated the Act by failing to furnish information.